No. 82-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

v.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENT, CITY OF STILLWATER, OKLAHOMA

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36 of the Supreme Court Rules on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. These member local governments operate NIMLO through their chief legal officers, variously called city or county attorney, corporation counsel, city

solicitor, or law director, and other titles, with each member local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by members of the Executive Committee of NIMLO, as the authorized law officers of their own local governments, and in their capacities as representatives of the NIMLO member municipalities. The City of Stillwater, Oklahoma is a member of NIMLO.

The municipal attorneys who operate NIMLO for their local governments are responsible for advising their governments' departments and agencies about the legal aspects of acquiring rights-of-way for various municipal public works projects. A reversal of the decision below will have greatly adverse consequences for those NIMLO member municipalities which have allotted Indian lands within their jurisdictions.[1] Should Petitioners prevail, states, cities, counties, towns, townships, school districts, public utilities, and all other public entities possessing the power of eminent domain would be barred from exercising such powers across allotted Indian lands.

As a result, necessary public improvements, as beneficial to Indian allottees as to other citizens, would not be made. Roads, electric power lines, gas pipelines, water pipelines, sewer systems, and a host of other public projects will not be built, even though the governmental

[1]As of 1980, the following States contained Indian Trust allotted property within their borders: Alabama, Arizona, California, Colorado, Idaho, Kansas, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, Wyoming. The total area involved is in excess of 10 million acres. Source, *Statistical Abstract of the United States 1981,* 102d Edition, United States Department of Commerce, Bureau of the Census, at 228. There are literally "thousands upon thousands" of scattered Indian allotments. *Poafpybitty v. Skelly Oil,* 390 U.S. 365, 374 (1968).

entities responsible for constructing such improvements had deemed them beneficial, necessary and proper. The consequences would be disastrous for future public improvements in those jurisdictions containing allotted Indian lands.

Should Petitioners prevail, "a single allottee could prevent the grant of a right of way over allotted Indian lands for necessary roads or water and power lines." *Yellowfish v. City of Stillwater,* 691 F.2d 926, 931 (10th Cir. 1982). Such a result would stifle economic growth and development, and is contrary to congressional intent. The National Institute of Municipal Law Officers, as *amicus curiae* in support of Respondent City of Stillwater, Oklahoma, respectfully urges that the Court deny the Petition for a Writ of Certiorari in this case.

Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY

The court below properly ruled that Respondent possessed the power to condemn rights-of-way across Indian trust allotments in order to construct a water pipeline. 25 U.S.C. § 357 [§ 357], which authorizes such condemnation, was not repealed by 25 U.S.C. §§ 323-328 [§ 328]. There is no express repeal, and Petitioners failed to meet the heavy burden needed to demonstrate an implied repeal. *Morton v. Mancari,* 417 U.S. 535 (1974); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit,* 393 U.S. 186 (1968). Where, as here, the statute has been in effect for decades, repeal by implication is particularly disfavored. *Mancari,* 417

U.S. at 549. As recently as 1980, this Court has recognized the continued vitality of the condemnation provisions contained in 25 U.S.C. § 357. *United States v. Clarke,* 445 U.S. 253 (1980).

In this case, the Tenth Circuit Court of Appeals, in accordance with *Andrus v. Glover Construction,* 446 U.S. 608, 618-619 (1980), correctly viewed both § 357 and § 328 as effective, each providing an alternate means for an authorized condemnor to obtain a right-of-way over allotted lands for public improvements.[2]

The court of appeals properly applied the decisions of this Court in rejecting Petitioners' claims of a repeal by implication. The courts of appeals that have decided this issue are all in accord with the decision below. The Petition for a Writ of Certiorari should be denied.

ARGUMENT

PETITIONERS HAVE FAILED TO DEMONSTRATE SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF THE WRIT.

A. There Is No Conflict Among The Federal Courts Of Appeals.

The decision below is in accord with the decisions of all other courts of appeals which have decided this issue. *Southern California Edison v. Rice,* 685 F.2d 354 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3701 (U.S. March 29, 1983) (No. 82-873); *Transok Pipeline v. Darks,* 565 F.2d 1150 (10th Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978);

[2]". . . [I]t is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective." *Glover Construction,* 446 U.S. at 618-619, quoting *Mancari,* 417 U.S. at 551.

Nicodemus v. Washington Water Power, 264 F.2d 614 (9th Cir. 1959); *United States v. Minnesota,* 113 F.2d 770 (8th Cir. 1940).[3]

Petitioners admit that they can point to no conflicts among the circuits regarding this issue. (Petitioners' Brief pp. 10-12).

B. The Proper Rules Of Statutory Construction Were Applied.

The decision of the Tenth Circuit in this case was in accord with the rules of statutory construction established by this Court.

Rather than finding a repeal by implication, which is disfavored, *Morton v. Mancari,* 417 U.S. 535, 549 (1974), the court reconciled the two statutes so that each was given effect. *Andrus v. Glover Construction Co.,* 446 U.S. 608, 618-619 (1980). If Congress had intended to eliminate condemnation of allotted Indian land, it could have clearly and expressly made its intentions known. *United States v. Oklahoma Gas & Electric,* 318 U.S. 206, 211 (1943).

C. The Rights Of Indian Allottees Are Protected.

A condemnation proceeding instituted under § 357 protects the rights of Indian allottees. Generally, condemnation can occur only after the institution of a judicial proceeding by a public authority, where just compensation must be paid for the acquired property. The burden rests

[3]Holding that condemnation under § 357 is not modified by the requirement of secretarial consent for rights-of-way under 25 U.S.C. § 311, both provisions applying to allotted lands.

with the condemning authority to prove the need for, and value of, the condemnation. *United States v. Clarke,* 445 U.S. 253, 257-258 (1980). The Indian allottees are not at the mercy of potentially capricious public authorities. A judicial proceeding, with allottees represented by the United States Attorney, insures the propriety of condemnation proceedings brought under 25 U.S.C. § 357.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully urges that the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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